IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 513

WILLIE NORVELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S BRIEF

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Opinion Below

The opinion of the Supreme Court of Illinois, reported at 25 Ill. 2d 169, 182 N.E. 2d 719, is printed at pages 51 to 55 of the Transcript of Record. The Criminal Court of Cook County, Illinois rendered no opinion in this cause.

Jurisdiction

The opinion and judgment of the Supreme Court of Illinois, affirming the judgment of the Criminal Court of Cook County, Illinois, were entered May 25, 1962. (Tr. 51-56.)* The petition for writ of certiorari was granted October 15, 1962. (Tr. 57.) The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3).

* "Tr." refers to the printed Transcript of Record on file in this Court.

Questions Presented

1. Has the Supreme Court of Illinois decided this case in a way that conflicts with *Eskridge* v. *Washington State Board*, 357 U.S. 214 (1958), by holding that "only prospective effect" should be given to *Griffin* v. *Illinois*, 351 U.S. 12 (1956)?

2. Has the Supreme Court of Illinois decided this case in a way that conflicts with the opinions of the Courts of Appeals for the Seventh and Tenth Circuits in *U. S. ex rel. Westbrook* v. *Randolph*, 259 F. 2d 215 (7th Cir. 1958), and *Patterson* v. *Medberry*, 290 F. 2d 275 (10th Cir. 1961)?

3. Where Illinois, through its own fault, and through no fault of a convicted indigent defendant, is unable to provide appellate review to the defendant because of the lack of a transcript of the trial, do the Due Process and Equal Protection clauses of the Fourteenth Amendment require that the defendant be given a new trial?

4. Since Illinois provides free stenographic transcripts and appellate review as of right to indigent defendants convicted prior to the date of this Court's decision in the *Griffin* case, may Illinois refuse to grant relief to an indigent defendant who, through no fault of his own, cannot be provided a transcript on which to base appellate review?

Or do the Due Process and Equal Protection Clauses of the Fourteenth Amendment require that such a defendant be awarded a new trial?

Constitutional Provision, Statute and Rule Involved

This case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution, Section 771 of the Illinois Criminal Code, and Rule 65—1 (2) of the Rules of the Supreme Court of Illinois, the full texts of which are set forth in Appendix A to this brief, pages 35 to 38.

STATEMENT

PETITIONER'S TRIAL AND CONVICTION

In September, 1941, petitioner Willie Norvell was indicted, together with James Norvell and Edgar Shepard, in Cook County, Illinois, for the murder of Michael Hetman on August 17, 1941. Petitioner, who was 18 years of age at the time, entered a plea of not guilty and waived trial by jury. He was represented by counsel retained by his family.

The case was tried in the Criminal Court of Cook County before Judge Edgar A. Jonas (sitting without a jury) on October 29 and 30, and November 3, 1941. The three defendants were tried together. Judge Jonas found all three guilty. After denial of petitioner's oral motions for new trial and arrest of judgment, he was sentenced to the Illinois State Penitentiary for a term of 199 years. James Norvell and Shepard each received a sentence of 50 years. (Tr. 1-2, 35, 39.)

PETITIONER'S PROMPT ATTEMPT TO OBTAIN THE TRIAL TRANSCRIPT

At the time of his conviction, petitioner made inquiries of the Official Reporters with respect to the method and cost of obtaining the transcript of the trial, and, on his motion, the trial court extended the time for presentation and certification of the transcript for 90 days. (Tr. 2.)*

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* In 1941, an Illinois statute provided for the appointment, official oath, duties and compensation of Official Court Reporters "who shall be skilled in verbatim reporting." The statute provided that the State was to pay the reporters' salaries, and it fixed charges for preparing transcripts. The statute also gave the trial judge power to order preparation of a transcript and direct that payment of the reporter's charges be taxed "in such manner as to him may seem just." (Ch. 38, §§163a and 163b, Ill. Rev. Stat. 1939.) A rule of the Illinois Supreme Court required that the transcript be certified by the trial judge and filed within 50 (later changed to 100) days after judgment. (Ch. 110, §259.70A, Ill. Rev. Stat. 1939.)

Although petitioner was indigent, his family retained an attorney for the trial, but no money was available with which to purchase from the Official Reporters a transcript of the testimony at his trial. The State of Illinois did not afford a means by which indigent defendants could obtain trial transcripts without payment of costs. Accordingly, he could not prosecute a writ of error from the judgment of conviction, or otherwise obtain judicial review of his trial. (Tr. 36-37, 42, 49-50.)

Nevertheless, petitioner continued to make efforts to obtain a transcript for appeal. (Tr. 49.) In 1952 he filed a motion to obtain the records of his trial, but the motion was denied. (Tr. 2.)

PETITIONER'S APPLICATION FOR THE TRIAL TRANSCRIPT UNDER ILLINOIS SUPREME COURT RULE 65-1(2)

On April 12, 1956, this Court announced in *Griffin* v. *Illinois*, 351 U.S. 12, that Illinois' failure to afford the means of appellate review to indigent persons convicted of crime violated the Due Process and Equal Protection Clauses. The Supreme Court of Illinois soon thereafter promulgated Rule 65-1, to conform Illinois procedures to Constitutional mandates. See *People* v. *Griffin*, 9 Ill. 2d 164, 137 N.E. 2d 485 (1956).

On November 19, 1956 petitioner filed a verified petition in the trial court pursuant to Rule 65-1(2) (the full text of which is set forth in Appendix A, pp. 35 to 38), requesting that he be furnished with a stenographic transcript of the report of proceedings of his trial.*

On December 4, 1956, an order was entered by Judge Wilbert F. Crowley finding (a) that petitioner was indigent

* For reasons not disclosed, no copy of this petition is contained in the record in this case.

both at the time of his conviction and at the time of filing his petition, and (b) that a stenographic transcript of the trial was necessary to present fully to a reviewing court the errors alleged in the petition. The Official Shorthand Reporter was ordered to transcribe his notes and furnish petitioner with a copy of the transcript without cost within a reasonable time. (Tr. 2-3.)

PETITIONER IS GIVEN A PARTIAL TRANSCRIPT

No action was taken in compliance with the order of December 4, 1956, until March, 1961 (after petitioner's present counsel were appointed by the Illinois Supreme Court). At that time, petitioner was furnished with a partial transcript of his 1941 trial, namely, a transcript of all of the proceedings held on October 30, 1941, and of a portion of the proceedings held on November 3, 1941, for which Mr. Gerald J. Healy served as Official Court Reporter. (Tr. 7-35.)

Mr. Healy reported that the Official Reporter at the remainder of the trial, Mr. E. M. Allen, was dead. Mr. Allen reported petitioner's trial all day October 29, and part of November 3, 1941. (Tr. 6.)

The transcript provided by Mr. Healy does not include any of the evidence introduced by the State during its case in chief.

The transcript contains some of the evidence introduced by the defendants (Ruby Lee Norvell, Tr. 7-9; Hanna Davis, Tr. 10-11; Hattie Williams, Tr. 11-13; Dr. William H. Haines, Tr. 13), and the State's rebuttal evidence (Dr. Haines, Tr. 14-20). From this testimony, it appears that petitioner was a mental defective who, from an early age, was subject to delusions and given to bizarre

conduct. The partial transcript contains a copy of a written confession which petitioner allegedly made (Tr. 21-35), but *there is no testimony concerning the confession:* The only references to the confession appearing in the partial transcript are (i) an order denying a motion to suppress confessions (Tr. 21), and (ii) colloquy between the trial judge and the Assistant State's Attorney at the conclusion of all of the proof, in which the trial judge warned that serious objections were raised to the admissibility of the confessions and "that if the confessions as to two of these boys are stricken, there is no testimony whatsoever against them outside of the verbal statements, if they are in the record, that incriminate these boys." The prosecutor said he recalled that there was evidence of a verbal confession by petitioner, testified to by Officer Nygren (Tr. 20), but this testimony is not in the partial transcript.

PETITIONER'S MOTION FOR A NARRATIVE TRIAL TRANSCRIPT OR FOR A NEW TRIAL

Upon receipt of this partial transcript, petitioner filed a motion in the trial court asking that hearings be held to determine whether Mr. Allen's notes were still in existence and, if so, whether they could be transcribed. Petitioner moved that if Mr. Allen's notes could not be transcribed, an adequate and complete narrative or bystanders' bill of exceptions be constructed, so that he could appeal. Petitioner also moved that he be awarded a new trial in the event it was found to be impossible to procure either a stenographic transcript of the trial or an adequate narrative transcript. (Tr. 3-5.)

Pursuant to petitioner's motion, hearings were held in the Criminal Court of Cook County during June, July and August, 1961, before Judge Richard B. Austin. (Tr. 5, 35-50.)

THE COMPLETE TRANSCRIPT CANNOT BE COMPILED.

Ned Hosford, Jr., an Official Court Reporter of the Criminal Court of Cook County for the past 14 years, produced the notebook containing the shorthand notes taken by E. M. Allen of petitioner's trial on October 29, 1941. (Tr. 36.) Mr. Hosford testified that Mr. Allen used the Munson system of shorthand; that the Munson system is no longer taught or used in Chicago; that Mr. Allen incorporated many arbitrary symbols of his own into his shorthand notes, making it practically impossible even for other Munson reporters to read the notes; and that he does not know of any living court reporter who uses the Munson system. (Tr. 37.)

Judge Austin stated that "I am convinced as a result of my investigation and connection with the *Bragg* case* that there is probably no one in the country who can transcribe Mr. Allen's notes." (Tr. 37.)

An effort was then made to reconstruct the transcript through the testimony of persons who attended the trial. Ten witnesses testified, including petitioner, his brother, Officer Nygren (who allegedly had testified to petitioner's oral confession), and a number of other Chicago policemen. ***None of the witnesses was able to recall any of the proof introduced at the 1941 trial.*** (Tr. 38-49.)

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* Judge Austin was referring to *People* v. *Oscar Bragg*, a case which involved the same question as the case at bar. The Illinois Supreme Court ordered that efforts should be made to transcribe Mr. Allen's notes (16 Ill. 2d 336, 157 N.E. 2d 57 (1959)). Judge Austin, who helped to prosecute Bragg in 1940, was a witness at the hearings on remand, at which time he learned of the extensive but unsuccessful efforts made by Bragg's counsel (petitioner's counsel here) and the State's Attorney to transcribe Mr. Allen's notes. The hearings to reconstruct the Bragg trial transcript proved unsuccessful; the trial court denied Bragg's motion for new trial; Bragg died while the case was pending on appeal in the Supreme Court of Illinois (Docket No. 35977), whereupon the case became moot and the appeal was dismissed. See also *People* v. *McKee*, 25 Ill. 2d 553, 185 N.E. 2d 682 (1962).

The State stipulated that immediately after his trial in 1941, petitioner tried to obtain the transcript for appeal, but he could not do so because he had no funds. (Tr. 49-50.)

PETITIONER'S MOTION FOR NEW TRIAL DENIED—AFFIRMED BY THE SUPREME COURT OF ILLINOIS

At the conclusion of the hearings on August 1, 1961, Judge Austin entered an order denying petitioner's motion for new trial. (Tr. 5.)

Petitioner sought review of this order in the Supreme Court of Illinois. He contended that the refusal to grant him a new trial violated his rights under the Due Process and Equal Protection Clauses of the 14th Amendment to the federal Constitution.

On May 25, 1962, the Supreme Court of Illinois rendered its opinion and judgment affirming the order of the Criminal Court of Cook County. (Tr. 51-56.)

In the course of its opinion, the court said (Tr. 53):

> "Because the Court of Appeals for the Tenth Circuit [referring to *Patterson* v. *Medberry*, 290 F. 2d 275 (10 Cir. 1961)], and probably the Seventh Circuit, (See *United States ex rel. Westbrook* v. *Randolph*, 259 F. 2d 215) have given the *Griffin* and *Eskridge* cases an interpretation different from our interpretation (see *People* v. *Berman*, 19 Ill. 2d 579,) we give the question further consideration."

After discussing and quoting from this Court's opinion in *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940), the Supreme Court of Illinois concluded (Tr. 54-55):

> "The actual existence and operative effect of the economic barriers which restricted the availability of appellate review for indigent defendants prior to the *Griffin* case is a fact which cannot be ignored. The

invalidation of these economic restrictions could not undo the consequences already suffered as a result of their existence and operation. These actualities dictate that only prospective effect be given to the invalidation of such restrictions.

"We are of the opinion that the intent, purpose and effect of the *Griffin* decision was to merely invalidate all existing financial barriers imposed by the State which restricted the availability of appellate review for indigent defendants and were not to otherwise affect final judgments of conviction. (*People* v. *Berman*, 19 Ill. 2d 579; Cf. *Chicot Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. ed. 329.) The judgment of the criminal court of Cook County denying defendant's motion for a new trial is affirmed."

Petitioner's petition to this Court for a writ of certiorari to the Supreme Court of Illinois was granted on October 15, 1962, and petitioner was granted leave to proceed as a pauper.*

Petitioner asks that this Court reverse the decision of the Supreme Court of Illinois, and order Illinois to grant petitioner a new trial.

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* The Clerk of this Court has printed the Transcript of Record. Petitioner's appointed counsel have paid for the printing of petitioner's briefs in this Court and in the Supreme Court of Illinois.

A SUMMARY OF UNDISPUTED FACTS

The following facts appear without dispute from the record in this case:

1. Petitioner was indigent at the time of his conviction. He has at all times continued to be, and is now, a pauper. (Tr. 36-37, 42, 49-50.) Accordingly, he could never purchase a transcript of the testimony at his trial, and under the practice followed in Illinois prior to the promulgation of Rule 65-1 on September 26, 1956, it would have been fruitless for him to have sought to be furnished with a transcript at the State's expense. Nevertheless, petitioner desired and attempted to appeal, and he took steps to obtain a trial transcript, but he was unsuccessful, solely because he was a pauper.

2. Illinois delayed for 15 years after petitioner's trial before it took steps to make its system of appeals available to petitioner so that he could seek appellate review and reversal of his trial, conviction and 199 year sentence.

3. After Rule 65-1(2) of the Rules of the Illinois Supreme Court was put into operation in 1956, petitioner filed a timely verified petition that he be supplied with a transcript of the testimony at his trial. This petition was not resisted by the State. Its sufficiency has never been challenged.

4. Petitioner exercised the same degree of diligence in seeking a free transcript of the testimony of his trial as the many other convicted prisoners who have been successful in obtaining free transcripts pursuant to Rule 65-1(2).

5. After considering petitioner's petition, the Chief Justice of the Criminal Court of Cook County entered an

order finding (a) that at the time of his conviction and at the time of filing his petition petitioner was without financial means to pay for the cost of a stenographic transcript of the proceedings at his trial, and (b) that a stenographic transcript of all the proceedings at petitioner's trial would be necessary to present fully the errors recited in his petition. The court ordered the Official Reporter to transcribe his notes of petitioner's trial. (Tr. 2-3.)

6. Thereafter, a partial transcript was certified and filed (Tr. 7-35), but because of the death of one of the Official Reporters whose notes could not be read, the State reported that the balance of the transcript—including all of the State's evidence in chief—could not be transcribed.

7. No adequate narrative transcript or bystanders' bill of exceptions of petitioner's trial can now be compiled.

8. *Petitioner's inability to obtain appellate review of his trial and conviction has arisen through no fault of petitioner, but solely because of Illinois' delay in conforming its procedures to the requirements of the 14th Amendment to the federal Constitution.*

SUMMARY OF ARGUMENT.

Under Illinois law, convicted criminal defendants have a right to appellate review of their convictions. The Supreme Court of Illinois has implemented the decision of this Court in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), by adoption of Rule 65-1, which provides that the State will furnish a free trial transcript to every indigent person convicted of crime, regardless of whether he was convicted before or after the *Griffin* decision. (Part I, pp. 13 to 15.)

Petitioner, who was convicted in 1941, cannot obtain a complete transcript of his trial because one of the Official Court Reporters who attended the trial is dead and the stenographic notes are illegible. Accordingly, petitioner is unable to exercise his right to appellate review. Petitioner's present plight was caused through no fault of his, but rather by Illinois' failure to conform its procedures to the mandates of the federal Constitution while it was still able to furnish petitioner with a complete trial transcript so that he could appeal. (Part II, pp. 16 to 21.)

The dilemma presented by this case can be solved only by awarding petitioner a new trial. This is the relief which was awarded by the Courts of Appeals for the Seventh and Tenth Circuits in similar cases involving indigent defendants convicted before *Griffin* who were unable to obtain trial transcripts through no fault of their own. Petitioner at bar is entitled to the same relief. Indeed, in two recent cases the Illinois Supreme Court awarded new trials when indigent defendants were unable to obtain trial transcripts. Petitioner should be afforded the same protection of Illinois law which was extended to those defendants. (Parts III and IV, pp. 21 to 26.)

Courts of other jurisdictions uniformly award new trials in criminal and civil cases where, through no fault of the would-be appellant, an adequate record upon which to premise review cannot be obtained. (Part V, pp. 26 to 32.)

Many cases in which Illinois defendants have obtained free trial transcripts under Rule 65-1 have been reversed outright or have been reversed and remanded for new trials. This demonstrates the need for appellate review of *all* Illinois convictions. The only way in which petitioner's constitutional right can be protected, and a grave injustice averted, is by awarding petitioner a new trial which, if it results in a conviction, may be reviewed. (Part VI, p. 33.)

ARGUMENT.

I.

APPELLATE REVIEW OF CRIMINAL CONVICTIONS IS AN INTEGRAL PART OF PROCEDURAL DUE PROCESS IN ILLINOIS, FOR THE INDIGENT AS WELL AS THE WEALTHY.

In 1941, when petitioner was tried, the Illinois Criminal Code provided (as it does today) that each person convicted of crime has the *right* to appellate review of his conviction by writ of error (Ch. 38, § 771, Ill. Rev. Stat. 1939; Appendix A, p. 35).

It was this same statute which gave rise to this Court's historic decision in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). A resume of that decision, and its aftereffects, is helpful in considering the case at bar.

The Griffin Case.

Griffin v. *Illinois*, 351 U.S. 12 (1956), concerned men who, like petitioner, were unable to obtain appellate review of their convictions at the time they were convicted, because they had no money with which to purchase a transcript of the trial proceedings. This Court held that since Illinois provides a right to appellate review in all criminal cases, every convicted person, regardless of his financial circumstances, must be afforded a genuine opportunity to have his trial scrutinized by an appellate court. Both the Due Process and Equal Protection Clauses of the federal Constitution require that Illinois make its system of appellate review of criminal convictions fully and practically

available to all persons convicted of crime, be they wealthy or poor (351 U.S. at 18-19):

> ". . . Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. [Citing cases.]
>
> ". . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

The Eskridge Case.

In *Eskridge* v. *Washington*, 357 U.S. 214 (1958), this Court held that the *Griffin* principle applies to men convicted before as well as after the date of the *Griffin* decision.

These cases made it clear that the federal Constitution requires Illinois to provide the means of appellate review to indigent persons convicted of crime, whether they were convicted before or after the *Griffin* decision.

Adoption of Illinois Supreme Court Rule 65-1.

Obedient to the mandate of this Court, the Supreme Court of Illinois on September 26, 1956 promulgated Rule 65-1, setting forth the procedure to be followed by convicted indigent defendants who desire to obtain a transcript of testimony without payment of cost. In so doing, the court recognized the "highly desirable" advance marked by the new rule. *People* v. *Griffin*, 9 Ill. 2d 164, 166 (1956).

Anticipating this Court's holding in *Eskridge,* the court gave Rule 65-1 full retroactive effect in subsection (2), saying (9 Ill. 2d at 167):

> "We have considered the applicability of doctrines of waiver. Our rules require that reports of proceedings at the trial be presented to the trial judge for approval within 100 days from the entry of judgment, or within the extended period fixed by the trial judge. It could be held that a prisoner who did not request a free transcript within the time so fixed has waived his right. But waiver assumes knowledge, and we are unwilling to hold, under the circumstances of this case, that the constitutional rights of prisoners have been waived. . . ."

Rule 65-1(2) applies to paupers convicted before *Griffin;* Rule 65-1(1) applies to those convicted after *Griffin.* All are entitled to a *gratis* trial transcript for appeal.

Thus, whether convicted before or after the announcement of the *Griffin* decision, and whether or not they had sought a free transcript at the time of their trials, convicted indigent defendants are entitled to have free transcripts furnished by the State of Illinois, and they are then entitled to seek and obtain review of their convictions by the Supreme Court of Illinois.

We now turn to the application of these authorities to the case at bar.

II.

SINCE, THROUGH NO FAULT OF PETITIONER, AN ADEQUATE TRANSCRIPT IS NOT AVAILABLE UPON WHICH TO BASE APPELLATE REVIEW OF HIS TRIAL, ILLINOIS MUST GRANT HIM A NEW TRIAL.

A.

Illinois Proximately Caused the Dilemma Presented by This Case, and Should Bear the Burden of Its Own Derelictions.

Although the complete process of law in criminal cases in Illinois includes appellate review of the trial following conviction, until forced to do so by this Court in 1956, Illinois refused to grant equal means of appellate review to defendants who were indigent and therefore were unable to purchase the typewritten report of proceedings.

The failure of Illinois to provide a means of appeal to petitioner in 1941 was a violation of his constitutional rights, notwithstanding that the breach was not exposed and articulated until 1956 in the *Griffin* case.

Rule 65-1(1) of the Illinois Supreme Court applies to the future. *Rule 65-1(2)* (Appendix A, pp. 35 to 38), *relating to past cases such as petitioner's, is designed to put the indigent convicted defendant in precisely the position he would have been in if, at the time he was convicted, a transcript had been available to him despite his poverty.* Rule 65-1(2) is fully retroactive, operating without regard to when the defendant was convicted or whether he tried to get a free transcript at the time of his conviction.

For most prisoners convicted before Rule 65-1-(2) was promulgated, the lapse of time between their trials and

enactment of the new rule meant only that judicial review of the trial—and possible reversal—was delayed. Almost all of those men have by now had appellate review; many convictions have been set aside (see Appendix B, pp. 39 to 46).

But for a few convicted paupers, Illinois' delay in making the complete process of law available to them has been found to be fatal to their opportunity to obtain the promised review. So it is with petitioner. Although he was more diligent in seeking a transcript than most of those who have secured reversals, he can never obtain review of his trial, for it has been discovered that one of the Official Court Reporters died during the period when Illinois still discriminated against the poor, and that the deceased reporter's notes are illegible. The judicial proceedings brought against petitioner in 1941 have never been—and now cannot be—completed.

Petitioner submits that Illinois' delay in conforming its procedures to the mandates of the federal Constitution proximately caused petitioner's present inability to obtain appellate review of his trial. But for that delay, petitioner would have obtained the review to which he concededly has a constitutional right.

We submit that the State must now put petitioner in the position he would have been in if, at the time of his trial, the transcript became unavailable through delays occasioned by the State. Under these circumstances, a new trial would clearly be required both by the Due Process and Equal Protection Clauses of the 14th Amendment.

Petitioner may not now be forced to accept unequal treatment and less than full process of Illinois law because the State, in violation of the federal Constitution, delayed until after Official Reporter Allen's death in making a free transcript available to petitioner.

B.

The Court Below Misapplied The Principle Of The Chicot Drainage Case.

The reliance of the court below on this Court's decision in the *Chicot* case (*Chicot Drainage District* v. *Baxter State Bank*, 308 U.S. 371) is entirely misplaced. The *Chicot* case involved application of the doctrine of *res judicata* following the declaration of unconstitutionality of the statute on which a prior civil decree affecting property rights was based. Faced with considerations of good faith and reliance, this Court ruled that the decree would not be affected.

No statute or decree is involved here, nor is the doctrine of *res judicata*. What is involved is the question whether petitioner's incarceration under a non-reviewable conviction must continue despite the fact that petitioner's inability to appeal was brought about by Illinois' unconstitutional conduct in refusing to make the transcript available to him during E. M. Allen's lifetime, and through no fault of petitioner's.

C.

No Reasonable Distinction Can Be Drawn Between Petitioner and Other Defendants Convicted Prior to Griffin For Whom Stenographic Transcripts Are Available.

The Illinois Supreme Court's decision is premised on the assumption that a reasonable classification may be made between indigent defendants convicted before April 23, 1956 who can obtain a stenographic transcript of the proceedings had at their trials, and those who cannot obtain a transcript or an acceptable substitute upon which to base an appeal.

Petitioner submits that this classification is unreasonable and capricious, and denies to petitioner equal protection of Illinois law, and deprives him of his liberty without due process of the law.

All indigent defendants convicted in Illinois prior to *Griffin* share the following common characteristics:

(1) The Illinois Criminal Code (Ch. 38, § 771, Ill. Rev. Stat. 1939) granted to all of these defendants appellate review as a matter of right.

(2) Each defendant was indigent at the time of his conviction and immediately thereafter.

(3) Solely by reason of his indigence, each defendant was prevented from obtaining a stenographic transcript of his trial proceedings, and was thereby prevented from obtaining appellate review of his conviction on the merits at the time of his trial.

(4) None of these defendants has waived his right to claim that he was prevented by his indigence from obtaining appellate review of his conviction. *Eskridge* v. *Washington State Board*, 357 U.S. 214 (1958); *People* v. *Griffin*, 9 Ill. 2d 164, 167-168 (1956).

(5) The requirement of the Illinois Supreme Court Rules—that the report of proceedings must be certified by the trial court within a specified time from the date of the judgment—has been withdrawn for all of these defendants.

(6) Each of these defendants is entitled to apply for and receive a trial transcript, without cost, under Illinois Supreme Court Rule 65-1.

The sole factor which differentiates petitioner from other members of the class is that, because one of the Official Reporters who attended his trial has died (some 8 years after petitioner's conviction) and his notes cannot be tran-

scribed, Illinois is now unable to provide him with a complete stenographic transcript of the trial.

But the unalterable fact is that this situation was created by the failure of Illinois to conform its procedures to the mandates of the federal Constitution until it was no longer able to furnish petitioner with the means upon which to premise appellate review of his conviction.

Men in the position of petitioner are no less entitled to full procedural due process than those whose Official Reporters still live or whose Official Reporters took legible shorthand notes. The distinction drawn by the court below is arbitrary and unfair.

If Illinois in 1941 had accorded all indigent defendants their full rights by supplying transcripts of their trials, petitioner would have obtained appellate review of his conviction. An outright reversal would have been ordered if the State's proof failed to convey to the reviewing court an "abiding conviction" of petitioner's guilt. Petitioner would have obtained a new trial if the reviewing court found that the evidence was insufficient to support the verdict or that prejudicial trial errors occurred.*

There is no rational basis for assuming that petitioner's appeal will be less meritorious than any other appellant seeking review of his criminal conviction.

We agree with the Illinois Supreme Court that "the consequences already suffered" as a result of the unconstitutional "economic restrictions" imposed by Illinois before 1956 can no longer be undone. Mr. Allen cannot be

* Since petitioner's motion for new trial was made orally (Tr. 35), he would be free on appeal to argue any error appearing in the record. *People* v. *Flynn*, 8 Ill. 2d 116, 118, 133 N.E. 2d 257, 259 (1956).

resurrected; his notes are forever illegible. Nor can Illinois give back to petitioner the lifetime he has spent behind bars. But it does not follow that the wrong which was visited upon petitioner by Illinois during Mr. Allen's lifetime—*viz.*, the failure to furnish the transcript without cost—must go completely uncorrected; but now the only means of redress is by awarding petitioner a new trial. He should not be required to spend the rest of his life in prison under a conviction which may well have been set aside on appeal, but which *through the fault of the State* is forever non-reviewable.

In short, Illinois' unconstitutional conduct first prevented and now has foreclosed petitioner from exercising his *right* to appellate review of his trial. Only by granting petitioner a new trial may he be afforded the full measure of justice which is guaranteed to him by the federal Constitution and the Illinois Criminal Code.

III.

THE COURTS OF APPEALS FOR THE SEVENTH AND TENTH CIRCUITS HAVE CORRECTLY AWARDED NEW TRIALS UNDER THESE CIRCUMSTANCES.

Under precisely these circumstances, the Courts of Appeals for the Seventh and Tenth Circuits have awarded new trials.

The Medberry Case

In *Patterson, Warden* v. *Medberry*, 290 F. 2d 275 (10th Cir. 1961), *certiorari denied* 368 U.S. 839, *rehearing denied*, 368 U.S. 922 (Nov. 21, 1961), Medberry, a pauper, was convicted of murder in a Colorado court in June, 1939, and sentenced to life imprisonment. He filed a notice of appeal and requested that he be furnished with a free transcript of the trial proceedings. The trial court denied his request for a transcript. His appeal went forward on the

common law record; the Colorado Supreme Court affirmed, holding that the trial court had not erred in refusing to have a transcript prepared at public expense. (107 Col. 15, 108 P. 2d 243 (1940)).

In 1958, following the decision in the *Griffin* case, Medberry began proceedings to obtain a transcript for appeal, or a new trial if no transcript was furnished. It was then learned that a transcript of Medberry's original trial proceedings was not available.* Eventually Medberry applied to the federal District Court in Colorado for a writ of habeas corpus under 28 U.S.C. §2254. After hearing, the district court ordered that if Medberry applied for appellate review of his conviction with 30 days, he must be given a transcript of his trial within 8 months; and failing that, he should be given a new trial; otherwise, he would be discharged from State custody. Since the transcript was not available, the effect of the order was to award Medberry a new trial.

The Attorney General of Colorado appealed to the Court of Appeals for the Tenth Circuit. The Court of Appeals stated the issue as follows (290 F. 2d at 276):

> "The issue presented in this habeas corpus proceeding concerns the effect of the due process and equal protection clauses of the 14th Amendment to the United States Constitution when a state refuses to supply an indigent defendant a free transcript of the trial proceedings necessary for an adequate review of a conviction in a murder case."

The Court of Appeals analyzed the *Griffin*, *Eskridge* and *Burns* cases (*Burns* v. *Ohio*, 360 U.S. 252), and concluded (290 F. 2d at 278):

> " . . . While it is unfortunate that at this late date the State of Colorado will be confronted with releas-

* The reported opinions do not disclose precisely why the transcript was unavailable. According to a statement in the appellee's brief filed in the Court of Appeals, the reason was the death of the court reporter. (Brief of Appellee, page 9, Docket No. 6594.)

ing one convicted of murder, or with the difficult but not insurmountable task of retrying him, yet, as said in the *Griffin* case, it is traditional in our system of government that 'constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.'

"The judgment is affirmed and the time for compliance therewith is extended to six months from the date of the issuance of the mandate herein."

This Court denied Colorado's petition for certiorari. (368 U.S. 839, rehearing denied 368 U.S. 922.)

The Westbrook Case

The Court of Appeals for the Seventh Circuit has also held that a convicted pauper in petitioner's position is entitled to a new trial. *U. S. ex rel. Westbrook* v. *Randolph*, 259 F. 2d 215 (7th Cir. 1958). In that case, the official court reporter lost his shorthand notes of Westbrook's 1948 trial, precluding appellate review, despite Westbrook's prompt efforts to obtain a transcript. Unable to obtain review or a new trial in Illinois courts, Westbrook (at all times a pauper) sought and obtained release under the Federal Habeas Corpus Act (28 U.S.C. § 2254). On appeal by the State, the Court of Appeals said (259 F. 2d at 217):

"We have here the unusual situation in which Westbrook has been denied his right of full appeal due to no fault of his own (since he promptly attempted to perfect his appeal), and because of a condition not created by the state and which it is powerless to remedy. We are faced here with the question of whether Westbrook's inability to appeal from a conviction on grounds which only a transcript of the proceedings would reveal, entitles him *ipso facto*, as the district court ruled, to absolute freedom rather than a new trial or some other relief."

The Court of Appeals held that Illinois must grant Westbrook a new, reviewable trial within 6 months, and, failing that, he should be ordered discharged by the federal district court. (259 F.2d at 219.)

The Court of Appeals denied the Illinois Attorney General's petition for rehearing, and he did not seek review in this Court.

These two cases are identical to the case at bar in their salient facts: Circumstances beyond the control of Westbrook, Medberry and Norvell prevented each of them from appealing his conviction. Each of them was and is without fault in failing to obtain appellate review. The difficulty common to them arose solely because the State failed to provide a trial transcript while it was still available.

It was held that Westbrook and Medberry were entitled under the Constitution to new trials. Norvell is entitled to the same relief.

IV.

THE SUPREME COURT OF ILLINOIS HAS RECENTLY AWARDED A NEW TRIAL TO A DEFENDANT WHOSE TRIAL TRANSCRIPT WAS UNAVAILABLE.

THE EQUAL PROTECTION CLAUSE REQUIRES THAT THE SAME RELIEF BE AFFORDED TO PETITIONER.

In its opinion in this case, the Supreme Court of Illinois did not advert to the decision it rendered eight months earlier in *People* v. *Castle* (Illinois Supreme Court Docket No. 35,783, September 22, 1961).*

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* The Court's memorandum order is not published in the Illinois reports; we have lodged with the Clerk of this Court a certified copy of the relevant pleadings and orders in the *Castle* case.

In 1957, Castle was convicted of murder in the Criminal Court of Cook County, Illinois. He applied for and was granted a free transcript under Rule 65-1. However, the Official Court Reporter suffered a stroke and was apparently unable to transcribe her notes, so that Castle could not obtain a trial transcript for review. Based upon this showing, the Illinois Supreme Court ordered that Castle's conviction be reversed, and that he be awarded a new trial.

If a new trial was awarded to Castle, why should not the same relief be afforded to petitioner? And yet petitioner, having been incarcerated under his conviction for over 20 years, has been denied relief, while Castle's conviction was promptly set aside.

Again, in *People* v. *Williams*, Illinois Supreme Court Docket No. 1886,* Williams was convicted in 1953 for taking indecent liberties with a child, and sentenced to imprisonment for from 19 to 20 years. Williams filed a petition under the Illinois Post-Conviction Hearing Act (Ch. 38, §§ 832-836, Ill. Rev. Stat. 1961), contending that fundamental error had occurred at his trial. During the course of the post-conviction hearings, it was discovered that the transcript of Williams' trial was unavailable because of the death of the Official Court Reporter and the illegibility of her notes. The trial judge thereupon awarded Williams a new trial. On appeal by the State of Illinois, the Illinois Supreme Court denied the State's petition for a writ of error to review the trial court's judgment.

Thus, the Supreme Court of Illinois itself has solved this dilemma in favor of the indigent defendant by awarding a new trial where the trial transcript is unavailable. Petitioner should be given the same protection of Illinois law

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* A certified copy of the relevant pleadings and order in the *Williams* case are lodged with the Clerk of this Court.

which was extended to Castle and Williams. But, without any discussion of these two cases, petitioner's request for a new trial was denied by the Illinois Supreme Court. We submit that petitioner has been denied equal protection of Illinois law, in contravention of the 14th Amendment to the federal Constitution.

V.

COURTS UNIFORMLY GRANT NEW TRIALS TO LITIGANTS WHERE, WITHOUT FAULT, THEY CANNOT OBTAIN AN ADEQUATE TRANSCRIPT FOR REVIEW OF THE TRIAL.

Criminal Cases

Granting a new trial when a convicted criminal defendant cannot obtain an adequate record for review is not an innovation in the law. Almost without exception, courts presented with this question have afforded the defendant a re-trial which could be reviewed if a second conviction resulted. In order that the defendant may have the benefit of the full process and protection of the law, the entire procedure is commenced again.

The result reached by the Supreme Court of Illinois in the instant case flies in the face of this entire body of law.

Federal

In *U. S.* v. *Di Canio*, 245 F. 2d 713 (2d Cir., 1957), the court reporter died before transcribing his notes; the transcript was prepared by another reporter.* While concluding that the transcript thus obtained fairly presented what occurred at the trial, the Court of Appeals recognized that a new trial will be awarded "if necessary to the protection of a party's rights." (245 F. 2d at 715.)

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* A certified copy of the relevant pleadings and order in the *Williams* case are lodged with the Clerk of this Court.

New York

This problem has arisen frequently in New York. In *People* v. *DeWilkowska*, 246 App. Div. 285, 285 N.Y.S. 430 (1936), the court reporter died and it was impossible for the defendant to obtain a transcript for appeal. The court pointed out the basic injustice to the unfortunate defendant whose reporter's notes are lost, and awarded a new trial, saying (285 N.Y.S. at 431):

> "The taking of an appeal by a defendant from a judgment of conviction is a matter of right. Where, however, it is impossible to obtain a transcript of the testimony taken upon the trial, the defendant obviously becomes foreclosed from having an appellate court review the evidence or rulings of the trial court. This, in effect amounts to a deprivation of the right to which the defendant is entitled."

In *People* v. *Cittrola*, 210 N.Y.S. 21 (App. Div. 1925), the reporter lost his shorthand notes of the trial, and in granting a new trial the court said (210 N.Y.S. at 22):

> "One convicted of a crime shall not be deprived of his rights to prosecute an appeal because the stenographer cannot produce the minutes of the trial."

Accord: ***People*** v. ***Schwach***, 16 App. Div. 2d 879, 228 N.Y.S. 2d 373 (1962) (court reporter died, new trial awarded to defendant); *People* v. *Willis*, 16 App. Div. 2d 822, 228 N.Y.S. 2d 755 (1962) (stenographic minutes of ***coram nobis*** hearing lost, ***de novo*** hearing ordered); ***People*** v. *Kaplan*, 278 App. Div. 665, 102 N.Y.S. 2d 714 (1951) (minutes of trial permanently unavailable, defendant granted a new trial); *People* v. *Keefe*, 254 App. Div. 683, 3 N.Y.S. 2d 473 (1938) (court reporter died, notes illegible, defendant awarded a new trial); *People* v. *Calloway*, 12 App. Div. 2d 948, 212 N.Y.S. 2d 82 (1961) (transcript of trial unavailable, new trial awarded to defendant).

Wyoming

Likewise in *Richardson* v. *State*, 15 Wyo. 465, 89 Pac. 1027 (1907), the court reporter lost his notes after conviction. In Wyoming, as in Illinois, appellate review of the trial is a statutory right. The Supreme Court of Wyoming awarded the defendant a new trial, saying (89 Pac at 1030):

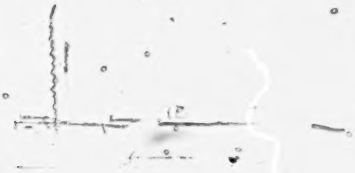
> " . . . The right granted by the statute is to have the final judgment reviewed, and, in case of error, vacated, modified, or annulled, and it is evident that, though a convicted defendant be permitted to file a petition in error, if he be prevented, through no fault of his own, of having made up and filed in this court a proper record necessary for a review of the judgment, he will have been deprived of the right of appeal granted by the statute . . . "

Indiana

Cook v. *State*, 231 Ind. 695, 97 N.E. 2d 625 (1951), involved a man who, like petitioner in the case at bar, was convicted of murder (sentenced to life imprisonment).

After long delay he perfected an appeal, but a question arose as to whether the stenographic transcript could still be obtained. The Supreme Court of Indiana said (97 N.E. 2d at 627):

> "A question of importance remains. It may be that, after this considerable lapse of time, a bill of exceptions containing the evidence cannot be procured, thus making it impossible, through no fault of the defendant, for this court to review the original judgment of conviction. If that situation should develop, a new trial should be granted unless the parties can agree upon a bill of exceptions. [Citing cases.]"



Oklahoma

The Criminal Court of Appeals of Oklahoma reached the same conclusion in *Bailey* v. *U. S.*, 104 Pac. 917, 918 (1909), using language forcefully apposite to petitioner's case:

> "It seems to be well established, as a general rule, that where a defendant has done all that the law requires in perfecting his appeal, and where the record necessary for a review of the case is lost or destroyed while in the custody of an officer of the court, in order to prevent a possible miscarriage of justice by depriving the defendant of his legal right of appeal, a new trial will be granted . . . "

In *Tegler* v. *State*, 3 Okl. Cr. 595, 107 Pac. 949 (1910), the trial judge died before the trial transcript ("case-made") was settled (apparently no court reporter was present at the trial. The transcript filed with the reviewing court was unsatisfactory. The court said (107 Pac. at 950-951):

> ". . . Shall a constitutional privilege conferring a substantial right be denied because some unavoidable accident renders the provisions of law inadequate? . . . It would be a contemptible farce to say that the defendant in this case has been granted the full enjoyment and exercise of his right of an appeal to this court, when, owing to the death of Judge Lowe, it had become out of the power of the defendant to present to this court a case-made as provided by law. . . . We cannot pass intelligently upon the questions presented to this court by the record proper, unless we can consider the facts transpiring at the trial and the testimony of the witnesses. This we cannot do without the case-made. . . .
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> ". . . as there is no case-made in this case, through no fault of the defendant or his counsel, manifest justice requires that the judgment of conviction be reversed, and the cause remanded for a new trial."

Missouri

State v. *McCarver*, 113 Mo. 602, 20 S.W. 1058 (1893), is quite similar to the instant case. There, an indigent defendant was unable to obtain a transcript after his conviction because the court clerk demanded his fees in advance. Eventually, the defendant applied for relief to the Supreme Court of Missouri. A search disclosed that in the interim the stenographic notes of the trial were lost, destroyed, or stolen. The Supreme Court of Missouri awarded a new trial, saying (20 S.W. at 1058-1059):

> ". . . the clerk was required, on the application of the defendant, to make out, certify, and return a full transcript of the record, etc., in the cause, and he had no authority to require the costs of the transcript in advance. His excuse, therefore, in not making out the transcript, which excuse has been hereinbefore quoted, respecting the poverty and inability of the defendant to pay for the much-needed transcript, was not a legal excuse; and the unwarranted delay caused by the refusal of the clerk to do his duty in the premises may have contributed somewhat to the abstraction, loss, or theft of the instrument in question. But, however, that may be, the defendant and his counsel are free from fault: and, having appealed to this court, he had and has a right to be heard in this court, which is 'open to every person,' regardless of their financial standing or inability to pay for the transcripts in their causes. Bill of Rights, § 10. In any ordinary case, we should have great hesitancy in reversing a judgment on account of such a defect in the record as is here presented; but being fully satisfied that the defendant is entirely without negligence or blame in the matter, and has made honest efforts to remedy a defect which, unremedied, would cause our affirmance of the judgment, without giving him an opportunity to be heard on the merits, we feel constrained, in order that right and justice may be done, and a grevious wrong, perhaps, averted, to reverse the judgment, and remand the cause. All concur."

Texas

In *Little* v. *State*, 131 Tex. Crim. 164, 97 S.W. 2d 479 (1936), the court reporter died before transcribing his shorthand notes of the trial. The State and the defendant were unable to agree on a statement of facts. The court ordered a new trial.

In *Bush* v. *State*, 127 Tex. Crim. 547, 78 S.W. 2d 625 (1935), the defendant was unable to obtain a transcript of the trial within the time allowed because he was unable to pay the reporter. He asked the court to mandamus the reporter to prepare the transcript, but, since the time had expired, the court awarded a new trial.

Civil Cases

The same result is uniformly reached in civil cases if, for reasons not ascribable to the losing party, the transcript becomes unavailable, and appeal is therefore impossible.

Federal

This Court stated in *Hume* v. *Bowie*, 148 U.S. 245, 253 (1893):

> ". . . Ordinarily where a party, without *laches* on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted. [Citing cases.]"

In *Guardian Assurance Co.* v. *Quintana*, 227 U.S. 100 (1913), this Court said (227 U.S. at 105):

> ". . . if there was no legal possibility of having the bill of exceptions settled and the right thereto was lost without any fault on the part of the plaintiff in error, the duty would obtain to grant a new trial."

A new trial was granted because the trial judge died without settling the transcript in *Penn Mutual Life Ins. Co.* v. *Ashe*, 145 Fed. 593 (6th Cir. 1906), pursuant to a

federal statute which expressly granted that authority to the successor judge (see 145 Fed. at 595-596).

See also *German Ins. Co.* v. *Town of Manning, Iowa*, 100 Fed. 581 (S.D. Iowa, 1900), reversed on other grounds, 107 Fed. 52 (8th Cir. 1901).

In *Herring* v. *Kennedy-Herring Hardware Co.*, 261 F. 2d 202 (6th Cir. 1958), the court reporter died before preparing the transcript, and the Court of Appeals directed the parties to attempt to reconstruct a record in the trial court. The court also said (261 F. 2d at 204):

> "... If, without fault on the part of the appellant, or because of the failure of the appellee to fully cooperate in the matter, the District Judge is of the opinion that a record cannot be prepared and presented to the Court of Appeals which will fairly and satisfactorily enable the Court to review the judgment entered in this action and that the appellant should be granted a new trial, he will so certify to this Court and the pending motion for a remand will be sustained for action by the District Judge on the motion under consideration by him."

Other jurisdictions

Many cases to this same effect are collected at 13 A.L.R. 102, 107-110; 107 A.L.R. 603, 605, and 19 A.L.R. 2d 1098.

Thus, the relief requested by petitioner is no different from that which courts in this country have historically afforded under the circumstances presented in this case. Since all states in which appeal is a matter of right are now required to provide without charge the means of appeal to pauper-defendants, and presumably are doing so promptly after the trial, the problem presented here is not likely to recur frequently. But in these few cases, in order to prevent what may well be a grave injustice, a new trial should be granted.

VI.

EXPERIENCE UNDER RULE 65-1 DEMONSTRATES THE NEED FOR APPELLATE REVIEW IN ILLINOIS.

In the *Griffin* case, this Court verged on the holding that appellate review is part and parcel of procedural due process in criminal cases. This Court called attention to the fact that "a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . ." (351 U.S. at 18-19.)

Experience in Illinois under Rule 65-1 has substantiated this Court's most dire expectations. Term after term since 1956, the Supreme Court of Illinois has set aside convictions of indigent defendants, many of whom were convicted by prosecutors who were amazingly lax about the rights of paupers, most of whom were convicted in the Criminal Court of Cook County, which, before Griffin, was thought to be the defendant's court of last as well as first resort.

For this Court's information, we have collected in Appendix B (pages 39 to 45) a list of the cases appealed to the Supreme Court of Illinois under Rule 65-1 which have resulted in reversals, including four sentences of 199 years (one of which was imposed in 1936), and nine life sentences. Many of the cases were reversed without remandment.

The large number of unfair trials unearthed through the operation of Rule 65-1 speaks for itself. The wisdom of the *Griffin* holding, and the crying need for appellate review of *all* criminal convictions, has been amply demonstrated, at least in Illinois.

Conclusion

In *Griffin* this Court said: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (351 U.S. at 19.) *A fortiori* there can be no equal justice where a defendant's right to appeal depends on whether the Official Court Reporter is long-lived or uses a legible system of shorthand.

Illinois' unconstitutional conduct—operating against petitioner for 21 imprisoned years—has created this case.

The time has come for the State to grant petitioner his full constitutional rights.

Petitioner should be afforded the full protection intended for all persons accused of crime in Illinois. He too should be given a chance to have an appellate tribunal scrutinize his trial record for prejudicial error. This cannot be done so far as his 1941 trial is concerned. He therefore ought to be granted a new trial which, if it results in a conviction, may be reviewed for error in due course.

Petitioner respectfully requests that the judgment of the Supreme Court of Illinois be reversed, and that this case be remanded with directions to award petitioner a new trial.

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APPENDIX A

Constitutional Provision, Statute and Rule Involved.

The 14th Amendment.

The Fourteenth Amendment to the Federal Constitution provides in part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Illinois Criminal Code.

At the time of petitioner's trial in 1941, the Illinois Criminal Code provided in Section 771 (Ch. 38, § 771, Ill. Rev. Stat. 1939):

> "Writs of error in all criminal cases, where sentence is not death, shall be considered as writs of right, and issued of course."

This provision is still contained in substance in the Illinois Criminal Code. (Ch. 38, § 769.1, Ill. Rev. Stat. 1961.)

Rule 65-1 of the Rules of the Supreme Court of Illinois.

Rule 65-1(2) of the Rules of the Supreme Court of Illinois (adopted June 19, 1956, amended Sept. 26, 1956) provides (Ch. 110, § 101.65-1, Ill. Rev. Stat. 1961):

> "Any imprisoned person, sentenced prior to April 23, 1956, may file, on or before March 1, 1957, in the court in which he was convicted, a petition requesting that he be furnished with a stenographic transcript of the proceedings at his trial. The petition shall be verified by the petitioner and shall state:
>
> (a) the date of his conviction and the charge upon which he was convicted;

(b) facts showing that he was at the time of his conviction and is at the time of filing the petition without financial means to pay for the cost of a stenographic transcript of the proceedings at his trial;

(c) the alleged errors which petitioner claims occurred at his trial; and

(d) that he desires to apply for issuance of a writ of error to review the conviction.

Notice of the filing of the petition and a copy of the petition shall be served upon the State's Attorney at the time the petition is filed. The State's Attorney may answer the petition within 20 days after service of the petition on him and shall transmit a copy of his answer, if any, to the petitioner. If upon consideration of the petition and answer, the court finds:

(a) that the petitioner was at the time of his conviction and is at the time of filing the petition without financial means to pay for the cost of a stenographic transcript of the proceedings at his trial, and

(b) that a stenographic transcript of the proceedings at his trial, (or any appropriate portion thereof), is necessary to present fully the errors recited in the petition,

the court shall direct the court reporter to transcribe an original and copy of his notes, in whole or in part, as is appropriate to present fully the errors set forth in the petition, without charge to the defendant. If satisfied as to the accuracy of the transcript, the court shall, irrespective of the provisions of Rule 65 fixing the time for the presentation, certification and filing of reports of proceedings at trials, certify to its correctness. The original of the certified transcript shall be filed with the clerk and the copy transmitted to the petitioner. In the event the court finds that it is impossible to furnish petitioner a stenographic tran-

script of the proceedings at his trial because of the unavailability of the court reporter who reported the proceedings and the inability of any other court reporter to transcribe the notes of the court reporter who served at the trial, or for any other reason, the court shall deny the petition.

"Thereafter, the petitioner may file in this court or in the Appellate Court, whichever is appropriate, an application for a writ of error to review his conviction. The application shall be verified by petitioner and entitled 'Petition for Writ of Error Under Rule 65-1.' It shall state (1) the crime charged against petitioner, the verdict, if any, of the jury, the judgment and sentence; and (2) a concise statement of all errors, whether or not stated in the petition for the transcript of the trial proceedings, which petitioner claims occurred at his trial. Copies of the application shall be served as provided for service of petitions under Rule 27, and proof of service shall be filed. The copy served upon the clerk of the trial court shall be accompanied by a *praecipe* designating the portions of the record of the trial court petitioner desires to have incorporated in the record to be reviewed. The clerk of the trial court shall, within 30 days after receipt of the application and *praecipe* and without cost to petitioner, prepare, certify and forward to the clerk of this court or of the Appellate Court, whichever is appropriate, a copy of the record as requested in the *praecipe*, always including, however, the indictment, information or complaint, the arraignment, plea, and the stenographic proceedings, if any, in respect thereto, the verdict of the jury, if any, the judgment and sentence, and the original of the transcript of the proceedings at the trial.

"The State's Attorney shall file an answer to the petition within 30 days after the copy of the record is required to be transmitted by the clerk of the trial court.

"Except as is otherwise provided in this rule, Rule 27 applies to and governs all proceedings, practice and procedure in this court and the Appellate Court as to applications for and writs of error granted under this rule.

"If upon examination of the petition, answer and record it does not appear there is reasonable ground to believe that prejudicial error occurred in the proceedings that resulted in petitioner's incarceration, the application for writ of error shall be denied."

APPENDIX B

Below are listed cases in which, according to information available to petitioner's counsel, appeals perfected under the provisions of Illinois Supreme Court Rule 65-1 (adopted in 1956) have resulted in reversals or reversals and remandment for further proceedings.

This list does not include cases appealed to the Supreme Court of Illinois by paupers from a death sentence which resulted in reversal, because Illinois has for many years made free transcripts available in such cases (Ch. 38, § 769a, Ill. Rev. Stat. 1961). See, e.g., *People* v. *Crump*, 5 Ill. 2d 251, 125 N.E. 2d 615 (1955); *People* v. *Jackson*, 9 Ill. 2d 484 (1956); *People* v. *Nemke*, 23 Ill. 2d 591, 179 N.E. 2d 825 (1962); *People* v. *Adams*, 25 Ill. 2d 568 (1962).

This list does not include cases appealed to the Supreme Court of Illinois under the Illinois Post-Conviction Hearing Act (Ch. 38, §§ 826-832, Ill. Rev. Stat. 1961) which have resulted in reversal and remandment for a new trial. See, for example, *People* v. *Williams*, No. 1886, referred to in this brief at page 25; *People* v. *Cox*, 12 Ill. 2d 265, 146 N. E. 2d 19 (1957) (the defendant convicted of murder in 1950, sentenced to 14 years imprisonment).

Nor does the list include cases in which this Court has set aside Illinois convictions on federal constitutional grounds. See, e.g., *Reck* v. *Pate*, 367 U.S. 433 (1961), reversing 274 F.2d 250 (7th Cir. 1960) (defendant convicted of murder in 1936, sentenced to imprisonment for 199 years); *Napue* v. *Illinois*, 360 U.S. 264 (1959), reversing 13 Ill. 2d 566 (1958) (defendant convicted of murder in 1940, sentenced to imprisonment for 199 years). Also excluded are cases in which lower federal courts have set aside Illinois convictions of paupers. See, e.g., *U. S. ex rel. Westbrook* v. *Randolph*, 259 F.2d 215 (7th Cir. 1958) (de-

fendant convicted of armed robbery in 1948, sentenced to imprisonment for 30 to 50 years) referred to above at page 23.

This list does not include cases in which the Supreme Court of Illinois reversed or reversed and remanded in a memorandum order not published in the official reports. See, for example, *People* v. *Clyde Castle*, Docket No. 35783, referred to in this brief at page 24.

Also not included are cases in which a County Public Defender has challenged an indigent defendant's sentence or incarceration by collateral means. See, for example, *People ex rel. Johnson* v. *Pate*, 23 Ill. 2d 409, 178 N.E. 2d 398 (1961) (original petition for habeas corpus; defendant having served sentence of 5 to 15 years less good time allowance, ordered discharged from custody).

Nor have we included paupers' cases which were remanded in order to correct an improper sentence. See, for example, *People* v. *Carr*, 23 Ill. 2d 103, 177 N.E. 2d 361 (1961) (sentence to the Illinois penitentiary for from 1 to 7 years set aside, remanded with directions to sentence defendant to the Illinois Youth Commission); *People* v. *Motis*, 23 Ill. 2d 556, 179 N.E. 2d 637 (1962) (sentence of 5 to 10 years held improper); *People* v. *Naujokas*, 25 Ill. 2d 32 (1962) (life sentence held improper); *People* v. *Moriarity*, 25 Ill. 2d 565, 185 N.E. 2d 688 (1962) (sentence of 10 years to life set aside).

There may well be omitted from this list cases brought to the Supreme Court of Illinois under Rule 65-1 where it does not appear from the official report or from information available to petitioner's counsel that the case was a pauper's case. However, petitioner's counsel believe that this list includes almost all of the cases appealed under Rule 65-1 which have resulted in reversal or reversal and remandment:

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Coulson	13 Ill. 2d 290, 149 N.E. 2d 96	Armed robbery	1955	5-10 years	Reversed	1958
Schlenger	13 Ill. 2d 63, 147 N.E. 2d 316	Grand larceny	1952	5-10 years	Reversed	1958
Hinton	14 Ill. 2d 424, 152 N.E. 2d 830	Indecent liberties and contributing	1955	5-10 years	Reversed and remanded	1958
Munroe	15 Ill. 2d 91, 154 N.E. 2d 225	Murder	1936	199 years	Reversed and remanded	1958
Sammons	17 Ill. 2d 316, 161 N.E. 2d 322	Murder			Reversed and remanded	1959
Tunstall	17 Ill. 2d 160, 161 N.E. 2d 300	Armed robbery		1-10 years	Reversed and remanded	1959
Nelson	18 Ill. 2d 313 164 N.E. 2d 16	Armed robbery	1957	20-35 years	Reversed and remanded	1960
Dirkans	18 Ill. 2d 300, 164 N.E. 2d 23	Armed robbery	1958		Reversed	1960
McKinzie	18 Ill. 2d 44, 163 N.E. 2d 1	Rape	1956	Life	Reversed and remanded	1959

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
O'Connell	20 Ill. 2d 442, 170 N.E. 2d 533	Armed robbery	1956	10-25 years	Reversed and remanded	1960
Morgan	20 Ill. 2d 437, 170 N.E. 2d 529	Larceny		5-10 years	Reversed and remanded	1960
Bender	20 Ill. 2d 45, 169 N.E. 2d 328	Armed robbery		Life	Reversed and remanded	1960
Strong	21 Ill. 2d 320, 172 N.E. 2d 765	Sale and possession of narcotics	1959	25 to Life	Reversed	1961
Gregory	22 Ill. 2d 601, 177 N.E. 2d 120	Murder		199 years	Reversed and remanded	1961
Birdette	22 Ill. 2d 577, 177 N.E. 2d 170	Armed robbery			Reversed and remanded	1961
Soznowski	22 Ill. 2d 540, 177 N.E. 2d 146	Burglary	1956	5 to 10 years	Reversed	1961
Williams	23 Ill. 2d 295, 178 N.E. 2d 372	Rape and robbery	1957	3-15 years	Reversed	1961
Harris	23 Ill. 2d 270, 178 N.E. 2d 291	Burglary	1958	Life	Reversed and remanded	1961

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Jackson	23 Ill. 2d 263, 178 N.E. 2d 310	Murder		199 years	Reversed and remanded	1961
Stewart	23 Ill. 2d 161, 177 N.E. 2d 237	Burglary and larceny	1955	Life	Reversed and remanded	1961
Johnson	23 Ill. 2d 465 178 N.E. 2d 878	Rape	1959	15 years	Reversed and remanded	1961
Wright	24 Ill. 2d 88 180 N.E. 2d 689	Rape and burglary	1957	10-20 and Life	Reversed and remanded	1962
Wyatt	24 Ill. 2d 151 180 N.E. 2d 478	Robbery	1959	1-8 years	Reversed and remanded	1962
Williams	24 Ill. 2d 214 181 N.E. 2d 353	Larceny			Reversed	1962
Lott	24 Ill. 2d 188 181 N.E. 2d 112	Sale and dispensing of narcotics		10 years	Reversed	1962
Shaw	24 Ill. 2d 219 181 N.E. 2d 120	Crime against nature	1958	2-7 years	Reversed	1962
Donaldson	24 Ill. 2d 315 181 N.E. 2d 131	Murder		Life	Reversed and remanded	1962
Jefferson	24 Ill. 2d 398 182 N.E. 2d 1	Armed robbery			Reversed	1962
King	24 Ill. 2d 409 182 N.E. 2d 194	Rape		199 years	Reversed and remanded	1962

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Mosley and Smith	24 Ill. 2d 565 182 N.E. 2d 658	Robbery	1961	5-8 years	Reversed and remanded	1962
Parren	24 Ill. 2d 572 182 N.E. 2d 662	Possession of narcotics	1959	4-7 years	Reversed	1962
Battle	24 Ill. 2d 592 182 N.E. 2d 713	Murder			Reversed and remanded	1962
Brown	24 Ill. 2d 603 182 N.E. 2d 710	Murder	1960	20 years	Reversed	1962
Roebuck	25 Ill. 2d 108 183 N.E. 2d 166	Possession of narcotics	1960	5-10 years	Reversed	1962
Nelson	25 Ill. 2d 38 ..... N.E. 2d	Armed robbery	1960	5 to Life	Reversed	1962
Crocker	25 Ill. 2d 52 183 N.E. 2d 161	Rape		25 years	Reversed and remanded	1962
Taylor	25 Ill. 2d 79 ..... N.E. 2d	Burglary	1960	5-8 years	Reversed	1962
Nimmer	25 Ill. 2d 319 185 N.E. 2d 249	Robbery		5-8 years	Reversed and remanded	1962
Kolden	25 Ill. 2d 327 185 N.E. 2d 170	Indecent liberties		1-20 years	Reversed	1962
Fuller	25 Ill. 2d 384 185 N.E. 2d 223	Armed robbery		8-10 years	Reversed	1962

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Lewis	25 Ill. 2d 396 185 N.E. 2d 668	Sale of narcotics			Reversed and remanded	1962
Mosby	25 Ill. 2d 400 185 N.E. 2d 152	Burglary	1960	5-10, 15-30 consecutively	Reversed and remanded	1962
Harrison	25 Ill. 2d 407 185 N.E. 2d 244	Rape, crime against nature	1960	10 years	Reversed as to two counts	1962
Smith	25 Ill. 2d 428 185 N.E. 2d 250	Burglary			Reversed and remanded	1962
Banks	Docket #35758	Rape	1956	Life	Reversed and remanded	1962
McGlothen	Docket #36425	Murder	1959	14-20 years	Reversed and remanded	1962
Dupree	Docket #36453	Armed robbery	1960	10-20 years	Reversed and remanded	1962
Canada	Docket #36474	Murder	1961	Life	Reversed and remanded	1962
Moore	Docket #36669	Sale of narcotics	1961	10-11 years	Reversed and remanded	1962
Polenisiak	Docket #37149	Possession of burglar tools	1960	1-2 years	Reversed	1962

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Pitts	Docket #36975	Possession of narcotics	1961	5-10 years	Reversed	1962
White	Docket #36898	Rape	1960	10 years	Reversed	1962
Givens	Docket #37161	Murder	1962	14-20 years	Reversed	1962
Friason	22 Ill. 2d 563 177 N.E. 2d 230	Burglary	1959	10-20 years	Reversed	1961
Robinson	23 Ill. 2d 27 177 N.E. 2d 132	Burglary and receiving stolen property		5-10 years	Reversed	1961
Crawford	23 Ill. 2d 605 179 N.E. 2d 667	Burglary	1960	2-20 years	Reversed and remanded	1962
Kuczynski	23 Ill. 2d 320 178 N.E. 2d 294	Armed robbery		Life	Reversed and remanded	1961
Bullocks	23 Ill. 2d 515 179 N.E. 2d 628	Larceny		3-10 years	Reversed and remanded	1962
Williams	23 Ill. 2d 540 179 N.E. 2d 839	Possession of narcotics		2-5 years	Reversed	1962
Sullivan	23 Ill. 2d 582 179 N.E. 2d 634	Sale of narcotics		5-15 years	Reversed	1962
Williams	25 Ill. 2d 562 185 N.E. 2d 686	Possession of narcotics		2-3 years	Reversed	1962